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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
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1 ANNETTE BAKAY and RICHARD
2 BAKAY, wife and husband,

3 Plaintiffs,

4 v.

5 LAURIE A. YARNES, in her individual and
6 official capacity as CLALLAM COUNTY
7 ANIMAL CONTROL OFFICER; LAURIE
8 A. YARNES and TODD A. YARNES, a
9 marital community; TRACEY KELLAS, in
10 her individual and official capacity as
11 CLALLAM COUNTY ANIMAL
12 CONTROL OFFICER, and RANDOLPH J.
13 KELLAS, husband and wife, a marital
14 community; CLALLAM COUNTY ex rel.
15 CLALLAM COUNTY SHERIFF'S OFFICE
16 and CLALLAM COUNTY ANIMAL
17 CONTROL, a Washington municipal
corporation; CHARLES B. SCHRAMM, in
his individual and official capacity as
PRESIDENT OF HUMANE SOCIETY OF
CLALLAM COUNTY (UBI 601-141-356),
a Washington nonprofit corporation;
CHARLES B. SCHRAMM and JANE DOE
SCHRAMM, a marital community;
HUMANE SOCIETY OF CLALLAM
COUNTY (UBI 601-141-356), a
Washington nonprofit corporation; TEV
BARROS, D.V.M. (vt6853), individually;
TEV M. BARROS and JANE DOE
BARROS, a marital community; and DOES
1-10,

18 Defendants.

19 This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment
20 on Defendant Laurie Yarnes and Defendant Tracey Kellas's Malicious Prosecution Counterclaim
21 (Dkt. 70). The Court has considered the pleadings filed in support of and in opposition to the
22 motion and the file herein.

23 PROCEDURAL AND FACTUAL BACKGROUND

24 Plaintiffs' pleadings indicate that this matter arose after Defendants searched the Lost
25 Mountain Cattery located on Plaintiffs' property in Sequim, Washington. Dkt. 46. On or
26 around December 10, 2001, Defendants seized approximately 68 "purebred" cats, and destroyed

Case No. C04-5803RJB

ORDER DENYING PLAINTIFFS'
SECOND MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
DEFENDANT LAURIE YARNES
AND DEFENDANT TRACEY
KELLAS' MALICIOUS
PROSECUTION COUNTERCLAIM

1 40 of them without Plaintiffs' permission. *Id.* at 2.

2 According to the Complaint, in late November 2001, Clallam County received a barking
 3 complaint from Plaintiffs' neighbor, prompting Animal Control Officer Yarnes to visit Plaintiffs'
 4 property. *Id.* at 4. Plaintiffs were out of town. *Id.* Defendant Yarnes talked with a substitute
 5 caretaker and the substitute caretaker's mother, the latter of whom "expressed concern for some
 6 of the cats housed inside the property." *Id.* Yarnes returned the following day and made a
 7 video tape. *Id.* at 5. After obtaining a search warrant, which Plaintiffs contend was illegal,
 8 members of the Clallam County Sheriff's Office returned to Plaintiffs' property on December 10,
 9 2001 and seized approximately 68 cats. *Id.* Plaintiffs were home at the time of the seizure. *Id.*

10
 11 While the Clallam County Sheriff's Office was at Plaintiffs' residence seizing the cats,
 12 Plaintiff Richard Bakay contends that he asked Yarnes and another animal control officer,
 13 Defendant Tracey Kellas, if they intended to euthanize certain cats. Dkt. 50, at 2. Bakay states
 14 they assured him no harm would come to the cats as long as he complied with the notice they
 15 gave him, which indicated that he had 15 days to petition in court for the cats' return. *Id.*
 16 Yarnes and Kellas deny giving Richard Bakay any such assurances. Dkts. 57 and 58.

17 The Complaint indicates veterinarian Defendant Tev M. Barros, D.V.M., examined the
 18 cats and ordered the euthanasia of at least 42 of them. Dkt. 46, at 4. Plaintiffs' Complaint
 19 alleges that even though Dr. Barros was video taped examining the cats and making the decision
 20 to euthanize each animal, Yarnes and Kellas were hidden off camera making signals to Dr.
 21 Barros as to which animals should be killed. *Id.* at 7. That evening and the next morning,
 22 Defendants killed the cats. *Id.* at 6. Later, Kellas served a search warrant on Plaintiffs'
 23 veterinarian, Dr. Linda Allen, and seized two cats, one of which was euthanized. *Id.*

24 According to the Complaint, in late December 2001, the Clallam County Prosecuting
 25 Attorney's Office filed 84 counts of animal cruelty charges against Plaintiff Annette Bakay. *Id.*
 26 at 6. Clallam County then lost the bodies of the euthanized cats. *Id.* All counts against Annette

1 Bakay were dismissed on November 12, 2002 pursuant to an Agreed Motion to Continue for
2 Dismissal signed August 27, 2002. *Id.*

3 The remaining 27 cats were returned to Plaintiffs, and Defendants have not had any of
4 Plaintiffs' cats in their possession since 2002. *Id.* According to the Complaint, Plaintiffs spayed
5 and neutered more than one half the remaining cats for various reasons. *Id.* Plaintiffs also lost
6 their Cat Fanciers' Association (CFA) license. *Id.*

7 As a result of the seizure and destruction of the cats, Plaintiffs have alleged violations of
8 the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution as a basis for
9 claims under 42 U.S.C. § 1983, and several state law claims. Dkt. 46. Plaintiffs filed their
10 Complaint on November 29, 2004. Dkt. 1. Defendants Laurie Yarnes and Tracey Kellas filed a
11 Counterclaim for malicious prosecution under RCW 4.24.350(2) on January 28, 2005. Dkt. 22.

12 MOTION FOR SUMMARY JUDGMENT

13 On August 19, 2005, Plaintiffs filed a motion for summary judgment on Defendant
14 Laurie Yarnes and Tracey Kellas's malicious prosecution counterclaim, requesting that (1)
15 statute RCW 4.24.350(2) be declared unconstitutional, and (2) Defendants' counterclaim be
16 dismissed on the basis that Plaintiffs have stated a *prima facie* case that does not, as a matter of
17 law, give rise to liability under the malicious prosecution statute.

18 Plaintiffs contend that RCW 4.24.350(2), the malicious prosecution statute, is
19 overbroad, and unconstitutionally deters citizens from exercising their fundamental right to
20 petition the government for redress by unreasonably chilling well-founded claims. Dkt. 70, at 4.
21 Plaintiffs also contend that the statute grants special privileges to law enforcement officers in
22 violation of the Equal Protection Clause of the state and federal constitutions. *Id.* at 5. Plaintiffs
23 also contend that the statute violates the First Amendment by placing a greater burden on a
24 plaintiff's speech when suing a police officer, because the statute allows for liquidated damages,
25 attorneys' fees, and costs for frivolous claims, even when the officer has not suffered damages.
Id. Plaintiffs state that "[e]ven if one brings a well-founded (but unsuccessful) lawsuit, the

litigant faces: (1) a fine of up to \$1,000 for liquidated damages; (2) a judgment against her for attorney's fees; and (3) a judgment against her for bringing frivolous, unfounded claims against police officers, but also for any legitimate but fruitless claim seeking redress for grievances." *Id.* at 6. Plaintiffs contend that RCW 4.24.350(2) is preempted by 42 U.S.C. § 1988 and Fed. R. Civ. P. 11(c)(2), which permit the Court to award reasonable attorneys' fees and costs to the prevailing defendant when faced with frivolous claims. *Id.* at 15. Plaintiffs argue that such protections afford defendant police officers more than adequate remedies for frivolous claims. *Id.*

Plaintiffs also contend that they have stated a prima facie case that does not, as a matter of law, give rise to liability under RCW 4.24.350(2). *Id.* at 18. Plaintiffs note that the burden rests on Defendants to prove malicious prosecution, which requires a showing that Plaintiffs lacked probable cause to institute or maintain the action, and that the action was brought with malice. *Id.* Plaintiffs also note that Washington case law requires a civil plaintiff to merely have a reasonable belief that the relevant facts can be established through the trial process to avoid liability under the malicious prosecution statute. *Id.* at 19. Plaintiffs contend that probable cause is evidenced by, among other things, testimony from Defendant Tev M. Barros, D.V.M., in which he allegedly admits that there was no medical necessity to kill Plaintiffs' cats (Dkt. 51) and that he allowed Defendants Todd Yarnes and Tracey Kellas to interfere with his professional judgment (Dkt. 70-3).

Defendants contend that RCW 4.24.350 does not abridge the First Amendment's right of access to the courts or the Fourteenth Amendment's guarantee of equal protection. Dkt. 97, at 7. Defendants argue that the First Amendment does not protect against frivolous litigation, and that RCW 4.24.350 passes the rational basis test because it does not create a suspect classification. *Id.* at 7-10. Defendants further argue that federal statutes for attorney fee-shifting do not preempt state malicious prosecution claims, such as those brought under RCW 4.24.350, because there is no evidence that Congress has expressly or impliedly preempted

1 RCW 4.24.350 or similar statutes. *Id.* at 13-14.

2 Defendants also contend that Plaintiffs have not shown that they had probable cause to
 3 bring their action. *Id.* at 15. Defendants concede that the existence of probable cause to initiate
 4 a lawsuit is an absolute defense to a malicious prosecution counterclaim, but contend that
 5 Plaintiffs lack probable cause and are using their own misconduct as a basis for profit. *Id.*
 6 Defendants argue that Plaintiffs' declaration of their alleged animal control expert, Michael
 7 Burgwin, should be inadmissible because Burgwin's opinions are conclusory, not based on any
 8 discussion of reviewed evidence, and not helpful to the trier of fact. *Id.* at 16. Defendants
 9 further argue that the numerous complaints about Plaintiffs' mistreatment of their felines,
 10 coupled with the declaration of licensed veterinarian Teri Byrd, indicate that Plaintiffs are
 11 seeking "to misuse judicial process by filing an action known to be false and unfounded"
 12 (quoting RCW 4.24.350(1)). *Id.* at 16-17.

13 SUMMARY JUDGMENT STANDARD

14 Summary judgment is proper only if the pleadings, depositions, answers to
 15 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
 16 genuine issue as to any material fact and the moving party is entitled to judgment as a matter of
 17 law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the
 18 nonmoving party fails to make a sufficient showing on an essential element of a claim in the case
 19 on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
 20 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could
 21 not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v.*
 22 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific,
 23 significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P.
 24 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence
 25 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions
 26 of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc.*

¹ *v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

DISCUSSION

A. MOTION TO CHALLENGE CONSTITUTIONALITY OF RCW 4.24.350(2)

Plaintiffs have requested that this Court declare RCW 4.24.350(2) unconstitutional due
14 to its overbreadth, and its chilling effect on free speech as protected by the First Amendment.
15 Plaintiffs further argue that the statute grants special privileges to law enforcement officers in
16 violation of the Equal Protection Clause of the state and federal constitutions. The following
17 discussion is taken, in part, from an oral opinion rendered by the undersigned in the case of
18 *Thomas v. City of Tacoma*, United States District Court for the Western District of Washington,
19 Case No. C01-5138RJB. (Therefore, the first person is used in places.)

I have struggled with this statute over the years. I do not like this statute, because I do not believe it necessary. I think it is sometimes abused by the very people it is designed to protect, that is, the police officers. Further, I believe that the original common law on malicious prosecution was adequate to address the problems that are addressed by RCW 4.24.350(2). My feelings about these things, however, is not justification for constitutional analysis, so I will leave aside my personal views about the wisdom of the statute.

1 The challenge to this statute is based on both state and federal constitutional grounds.
2 As a matter of history, the issue of what elements constitute a malicious prosecution claim
3 started in 1942 with *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485 (1942), which
4 provided common law elements of the claim. The element of damages required the plaintiff to
5 suffer injury as a result of wrongful prosecution. *Id.* at 497. *Peasley*, and its line of authority,
6 was modified in 1954 by *Petrich v. McDonald*, 44 Wn.2d 211, 221-22 (1954), which held that
7 there is no cause of action for malicious prosecution unless an arrest or special injury was
8 sustained. In 1979, for reasons unknown, the Washington Supreme Court changed the damage
9 elements, requiring special damages, arrest, and/or seizure of property. *Gem Trading Co., Inc.*
10 *v. Cudahy Corp.*, 92 Wn.2d 956, 966 (1979). I suspect that the Court was concerned with
11 public policy each time it narrowed the malicious prosecution common law claim, first in *Petrich*
12 and later in *Gem Trading*. In response to *Gem Trading*, the legislature, in its wisdom, adopted
13 the statute that is here at issue. They did so with the findings that are now part of the statute's
14 historical and statutory notes.

15 Those findings are clear, and it is interesting to note that the only difference from the
16 common law and the legislature's version is the elimination of the elements of special damages,
17 arrest, and seizure of property to show damages. They eliminated these elements only for
18 judicial officers, prosecuting authorities, and law enforcement officers. That limitation is at issue
19 here in this constitutional question. The counterclaim, brought under RCW 4.24.350(2), is
20 attacked on both First Amendment and Fourteenth Amendment grounds; that is, the Petition
21 Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.
22 It is also attacked on equivalent state constitutional grounds, which I take to be Article I,
23 Section 4 of the State Constitution, which addresses the right of petition, and Article I, Section
24 12, which speaks to special privileges and immunities (equal protection, if you will).

25 In *Silveira v. Lockyer*, 312 F.3d. 1052 (2002), the Court of Appeals for the Ninth Circuit
26 addressed the Second Amendment right to possess arms, which is not at issue here. The Court,

1 however, speaking through Judge Reinhardt, set out very well the standard of review that we
 2 are dealing with in this case:

3 When a state statute burdens a fundamental right or targets a suspect class, that
 4 statute receives heightened scrutiny under the Fourteenth Amendment's Equal
 5 Protection Clause. Statutes that treat individuals differently based on their race,
 6 alienage, or national origin are subjected to strict scrutiny and will be sustained
 7 only if they are suitably tailored to serve a compelling state interest. Statutes
 8 infringing on fundamental rights are subject to the same searching review.
 9 However, if a legislative act neither affects the exercise of a fundamental right, nor
 10 classifies persons based on protected characteristics, then that statute will be
 11 upheld if the classification drawn by the statute is rationally related to a legitimate
 12 state interest. *Id.* at 1087-88 (internal citations and quotations omitted).

13 The Supreme Court has observed that the rational-basis test is a relatively relaxed
 14 standard reflecting the court's awareness that the drawing of lines that create
 15 distinctions is primarily a task for the legislatures. Nevertheless, several general
 16 principles may be distilled from the several (and sometimes contradictory) cases in
 17 which the Supreme Court has applied the test. First, in order for a state action to
 18 trigger equal protection review at all, that action must treat similarly situated
 19 persons disparately. Second, when assessing the validity of legislation under the
 20 rational-basis test, the general rule is that legislation is presumed to be valid and
 21 will be sustained if the classification drawn by the statute is rationally related to a
 22 legitimate state interest. Third, there must exist some rational connection between
 23 the state's objective for its legislative classification and the means by which it
 24 classifies its citizens. Although rational-basis review is undoubtedly
 25 deferential—indeed, a paradigm of judicial restraint—it is nevertheless our duty to
 26 scrutinize the connection, if any, between the goal of a legislative act and the way
 in which individuals are classified in order to achieve that goal. *Id.* at 1088
 (internal citations and quotations omitted).

Finally, the burden falls upon the party attacking a legislative classification reviewed under the rational-basis standard to demonstrate that there is no reasonable basis for the challenged distinction. When a statute is reviewed under the rational-basis test, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. The legislative record need not contain empirical evidence to support the classification so long as the legislative choice is a reasonable one. The Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification. Although the government is relieved of providing a justification for a statute challenged under the rational-basis test, such a justification must nevertheless exist, or the standard of review would have no meaning at all. Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. *Id.* at 1089 (internal citations and quotations omitted).

This lengthy citation accurately sets out the standards faced by this Court in this particular

1 attack on this particular statute.

2 Addressing first the right to petition, we know that the state views this right more
3 narrowly than the federal government. The state right is basically narrowed to political
4 questions, while the federal right includes the right to petition courts. Here, Plaintiffs claim that
5 the malicious prosecution statute chills the right of access to the courts. What struck me about
6 this claim is that it is essentially an ipse dixit argument, which means, “because I said so.” The
7 argument that the Plaintiff makes is basically an argument without an underlying factual basis or
8 showing. It appears based on no more than Plaintiffs’ human experience regarding how such
9 things affect people. That argument fails in the face of legislative findings. There is simply not a
10 showing here sufficient to justify the conclusion that this statute in some way chills the right of
11 access to the courts. In addition, in this case, Mr. Karp’s clients are certainly not chilled by the
12 existence of this statute. They have full access to the court and have brought their claim (and
13 numerous motions) in the face of the possibility that there would be a counterclaim based on
14 RCW 4.24.350(2). We also know that the Supreme Court has repeatedly held that the First
15 Amendment does not protect suits that are both objectively baseless and subjectively motivated
16 by an unlawful purpose. Plaintiffs’ First Amendment argument fails because a rational reason is
17 set forth in the statute both for the classification and for the statute itself, and there is a rational
18 relationship between the stated reason for the statute and the statute’s content. Further, strict
19 scrutiny does not apply to the First Amendment argument here. A malicious prosecution claim,
20 in any context, requires that the claimant prove malice and a want of probable cause. A
21 malicious prosecution claim that fails to prove these elements, that is, a case that is well founded
22 but unsuccessful, will fail as a matter of law. In sum, there is a rational relationship between the
23 law and the reason for the law. The claim does not involve a fundamental right and strict
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1 scrutiny does not apply.

2 With regard to the equal protection argument under the Fourteenth Amendment and the
3 state constitution, the right of access to the courts again arises as an issue. We know that the
4 equal protection doctrine prohibits a state from denying to any person within its jurisdiction the
5 equal protection of the laws. Essentially, this is a maxim that all persons similarly situated
6 should be treated alike. However, in looking at the beneficiaries of this statute—police,
7 prosecutors, and judges—we note that they are set apart for many reasons. We give them
8 powers no one else has, such as the power to arrest, issue warrants, bring lawsuits, and start
9 criminal proceedings against individuals. They have a unique role in our society. We also know
10 that the law has given protections to police, judges, and prosecutors that other members of our
11 society do not have. Those protections are given because of the unique nature of their work.
12 The qualified immunity possessed by prosecutors and absolute immunity possessed by judges are
13 particularly salient examples of special protections. It is not a suspect classification to treat
14 police officers, judges, and prosecutors as a separate class or to distinguish them from the rest of
15 the public. It is appropriate to come to such conclusion because of the unique roles played in
16 society by this class of individuals.
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18 Addressing next the right to sue: The right to sue is a right, but not a fundamental right
19 in the way that some other rights are fundamental. The right to sue is a limited and restricted
20 right. If you do not like something about our country, you have an absolute and fundamental
21 right to petition the government through the political process, but you do not always have a
22 similar right to bring lawsuits. For example, just because one thinks a law is unjust or unfair, a
23 private citizen does not have the right to bring a lawsuit to have the law thrown out, because
24 such actions are limited and restricted by statute, case law, and common law. No one has an
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1 absolute right to sue under all circumstances. Limits include, of course, not being able to bring a
2 lawsuit based on malice, or without probable cause. Here, however, contrary to Plaintiffs'
3 argument, the right to sue is not really the issue. What is at issue is the elements of damages
4 that are provided to people classified as prosecutors, judges, and police, rather than the right to
5 bring a claim when there is lack of probable cause and malice. It does initially seem unfair that
6 Defendant police officers have different elements of proof, but as I have indicated above, there is
7 a solid reason for the distinction and classification set forth in the statute.
8

9 It is also important to note that fairness runs two ways. The police and prosecutors have
10 no right to bring a frivolous claim, or a claim without probable cause, and—as Plaintiffs pointed
11 out—a plaintiff is also protected under Fed. R. Civ. P. 11(c) from malicious counterclaims. I
12 emphasize this simply to illustrate that police, just the same as everybody else, are restricted by
13 the law from bringing frivolous counterclaims, and from bringing counterclaims based on malice
14 or want of probable cause. Fed. R. Civ. P. 11(c) speaks to all claims, not just the kind of claims
15 we are talking about here. Under Rule 11, we have sanctions available against anyone, and
16 certainly any lawyer, who brings a malicious case or a case without probable cause. Not
17 surprisingly, the existence of these sanctions have not chilled the rights of access to the courts.
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19 Another common complaint about RCW 4.24.350(2) is that it allows a police officer's
20 counterclaim to be brought in the plaintiff's case rather than leaving it for later proceedings.
21 This portion of the statute has the potential of muddying the waters of the plaintiff's case
22 unfairly. It is, however, essentially a procedural provision and any unfairness can be eliminated
23 by bifurcating the trial so that issues of the counterclaim are not addressed unless—and
24 until—defendants have prevailed on the plaintiff's claim.

25 While I believe that the law did not need to be changed from the common law that
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1 developed before the 1940s, it has been changed, and we have to live with it even though it
 2 provides a remedy to the police, prosecutors, and judges that are not given to others. RCW
 3 4.24.350(2) does not involve a suspect classification nor does it violate a fundamental right.
 4 Further, strict scrutiny does not apply to the First and Fourteenth Amendment arguments, and
 5 the classification and distinction created by the statute bears a rational relationship to the
 6 legitimate purpose set forth in the statutory history. RCW 4.24.350(2) is not unconstitutional.
 7

8 **B. MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' MALICIOUS
 9 PROSECUTION COUNTERCLAIM**

10 Plaintiffs also move to dismiss Defendants' counterclaim for malicious prosecution on
 11 summary judgment. Plaintiffs argue that, in order to prove malicious prosecution under RCW
 12 4.24.350(2), Defendants must demonstrate that Plaintiffs lacked probable cause to institute or
 13 maintain their action. Plaintiffs contend that their evidence shows as a matter of law that they
 14 had probable cause, and, therefore, Defendants' counterclaim for malicious prosecution should
 15 be dismissed.

16 In *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*, 119 Wn.
 17 App. 665, 695-96 (2004), the court discussed motions for summary judgment against a
 18 malicious prosecution claim:

20 At trial, the malicious prosecution claimant has the burden of proving each
 21 necessary element. But when a malicious prosecution defendant moves for
 22 summary judgment before trial, he or she bears the initial burden of showing the
 23 absence of an issue of material fact. Only if he or she meets this burden is the non-
 24 moving party obligated to produce facts sufficient to show the presence of an issue
 25 of material fact. Accordingly, the first issue here is whether [the moving party]
 26 bore their initial burden of showing the absence of a material issue of fact with
 respect to the absence of probable cause—or, when the double negatives are
 eliminated, whether [the moving party] showed as a matter of law (i.e., so clearly
 that reasonable minds could not differ) that they had probable cause to bring the
 federal case. If they did not show probable cause that clearly, its presence or
 absence must be decided by a trier of fact. (Internal citations and quotations

1 omitted.)

2 Plaintiffs have not submitted any evidence that shows that probable cause for their action
3 exists as a matter of law. In support of their motion for summary judgment, Plaintiffs have
4 submitted (1) a declaration from Plaintiffs Annette and Richard Bakay, (2) four letters stating
5 the opinions of four “experts” in the area of animal control, and (3) testimony of Defendant Tev
6 Barros, the veterinarian that allegedly approved the euthanization of Plaintiffs’ cats. The
7 declaration and opinion letters essentially repeat the allegations found in Plaintiffs’ Complaint,
8 and do not add anything substantial to the argument that Plaintiffs have probable cause to bring
9 their action. Further, Defendant Barros’ testimony is ambiguous. Plaintiffs contend, among
10 other things, that Defendant Barros’ testimony shows that he allowed others to interfere with his
11 professional judgment, while the testimony simply states that “all of us were partially
12 responsible” for the decision to euthanize the cats. Plaintiffs’ evidence falls short of meeting the
13 standards set forth in *Loeffelholz*, which require Plaintiffs to show the absence of an issue of
14 material fact—or, stated in a different way—which require Plaintiffs to show, in a manner so clear
15 that reasonable minds could not differ, that they had probable cause to bring their action.
16 Because Plaintiffs have failed by a wide margin to make this showing, the issue of whether
17 probable cause exists must be decided by a trier of fact.

18
19 ORDER

20
21 Therefore, it is hereby

22 **ORDERED** that Plaintiffs’ Second Motion for Partial Summary Judgment on Defendant
23 Laurie Yarnes and Defendant Tracey Kellas’s Malicious Prosecution Counterclaim (Dkt. 70) is
24 **DENIED** as follows:

1 1) Plaintiffs' motion to challenge constitutionality of RCW 4.24.350(2) is **DENIED**; and
2 2) Plaintiffs' motion to dismiss Defendant Laurie Yarnes and Defendant Tracey Kellas's
3 counterclaim for malicious prosecution is **DENIED** without prejudice.
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5 The Clerk of the Court is instructed to send uncertified copies of this Order to all
6 counsel of record and to any party appearing *pro se* at said party's last known address.

7 DATED this 4th day of October, 2005.

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Robert J. Bryan

11 United States District Judge
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